

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:02-CR-00066-1-F
No. 7:11-CV-00279-F

DENNIS EUGENE SIMMONS,)
 Petitioner,)
)
 v.)
)
UNITED STATES OF AMERICA,)
 Respondent.)

O R D E R

This matter is before the court on the Government's Response [DE-25] to Dennis Eugene Simmons' pending Motion to Vacate, Set Aside or Correct his conviction and sentence [DE-20 & -22], pursuant to 28 U.S.C. § 2255. Simmons, through counsel, asserts one claim. He contends that he is not guilty of having been a felon in possession of a firearm under 18 U.S.C. § 922(g), in light of *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc). Simmons entered a plea of guilty to that offense pursuant to a plea agreement on August 29, 2002, see [DE-11], and was sentenced on January 21, 2003, to a term of 160 months, followed by a five-year term of supervised release and an \$8,400.00 fine. See Judgment [DE-16]. Simmons' projected release date is March 23, 2014.

In response to Simmons' § 2255 motion, the Government has waived the statute of limitations defense and elects not to enforce the waiver language contained in Simmons' plea agreement. The Government acknowledges that Simmons' conviction and sentence should be vacated. See Response [DE-25], p. 2. The court accepts the Government's position and its suggested remedy.

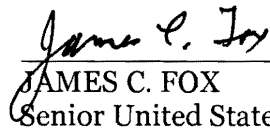
A review of his prior criminal record, in light of the ruling in *Simmons* and the content of the Government's Response [DE-25], together with the record in this case convinces the court that Simmons in fact was and is "actually innocent" of the § 922(c) conviction. Because he was

not a “felon” at the time of that alleged offense under North Carolina law, as properly construed, an element of the § 922(g) offense was lacking.

In summary, for good cause and as requested in the Government’s Response [DE-25], Simmons’ § 2255 motion [DE-20 & -22] is ALLOWED. The judgment of conviction and sentence, entered on January 21, 2003 [DE-16], hereby is VACATED. Dennis Eugene Simmons is ORDERED to be released from federal custody, subject to pending detainers, if any.

SO ORDERED.

This, the 10th day of September, 2012.



JAMES C. FOX
Senior United States District Judge